

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2116

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
EDWARD L. KIRKLAND and NATHANIEL HAYES, :
each individually and on behalf of all :
others similarly situated, :

Plaintiff-Appellees, :

-against- :

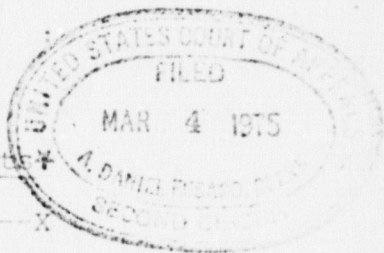
THE NEW YORK STATE DEPARTMENT OF :
CORRECTIONAL SERVICES; RUSSEL OSWALD, :
individually and in his capacity as :
Commissioner of the New York State :
Department of Correctional Services; :
THE NEW YORK STATE CIVIL SERVICE :
COMMISSION; ERSA POSTON, individually and :
in her capacity as President of the :
New York State Civil Service Commission :
and Civil Service Commissioner; MICHAEL :
N. SCELSI and CHARLES F. STOCKMEISTER, :
each individually and in his capacity as :
Civil Service Commissioner, :

Defendants-Appellants.:

and

ALBERT M. RIBBITO and HENRY L. CCONS,

Intervenors-Appellants



-----X
On Appeal From The United States District
Court For The Southern District of New York

ERRATA FOR BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

P. 4, line 14: Change "missions" to "omissions".

P. 5, line 4: Insert "of law" after "matter".

P. 5, line 17: Change "jeopardize" to "jeopardized".

P. 5, line 19: Change "appointment" to "appointments".

Statement of the Case

A. Prior Proceedings

P. 7, line 3: Insert "was" after "action".

P. 7, line 11: Insert "to be" after "(Male)".

P. 7, line 12: Change "preliminary" to "preliminarily".

P. 7, line 13: Change "invalidated" to "unvalidated".

P. 8, line 11: Insert "rate" after "passing".

P. 11, line 6: Change "capacity" to "capacities".

P. 11, line 24: Delete "to be defined" and add "to define" after "sought".

P. 12, line 29: Change "is" to "was".

P. 12, line 30: Change "is" to "was".

P. 13, line 8: Delete "any".

P. 13, line 13: Add quotation marks before "so".

P. 13, line 14: Change "plaintiff" to "plaintiffs".

P. 13, line 15: Change "its" to "their".

P. 13, line 16: Change "its" to "their".

P. 13, line 16: Change "show" to "showing".

P. 17, line 5: Add "upon a" after "sergeant".

B. The Development of Examination 34-944

P. 18, line 14: Change "decision" to "decisions".

P. 18, lines 17-18: Delete ", who is the Deputy Commissioner for Correctional Services".

P. 18, line 18: Delete ", who".

P. 19, line 3: Change comma to period. Insert "He".

P. 19, line 4: Delete first comma.

P. 19, second footnote, line 4-5: Insert "necessary" after "the" and delete the words "he should".

P. 19, second footnote, line 11: Delete "necessarily".

P. 19, second footnote, line 12: Delete "really" and insert "highly" after "have to be".

P. 19, second footnote, line 13: Insert "to be appointed", after "enough".

P. 19, second footnote, line 16: Change "germaine" to "germane".

P. 20, line 15: Change "were prepared" to "began".

P. 20, footnote, line 1: Change "are" to "consists of".

P. 20, footnote, line 2: Change "in" to "for".

P. 20, footnote, lines 3-4: Add period after "titles". Delete "and are subject matter in these areas."

P. 20, footnote, line 6: Insert after "Decker", "as well as their chief, Norma Kunofsky"; delete "hereto as Exhibits" and insert instead "in Appendix I".

P. 20, footnote, line 7: Delete double asterisks.

P. 21, line 22: Change "control" to "describe".

P. 22, line 1: Change "be" to "he".

P. 22, line 7: Delete ", as others". Insert instead "on the ground that other answers".

P. 22, line 8: Change "then" to "than".

P. 22, line 12: Insert comma after the word "law".

P. 22, line 14: Change "his" to "this".

P. 22, line 19: Insert comma after the word "promulgated".

P. 22, footnote, line 1: Delete "however". Insert comma.

P. 23, line 1: Delete "action was commenced a computational review was held,". Insert instead "The second, "computational," review was held shortly after the action was commenced".

P. 23, line 19: Change "operation" to "opinion".

C. The Trial

P. 23, line 26: Change "to" to "against".

P. 24, lines 11-12: Delete "and performance on a facility by facility basis".

P. 24, line 22: Change "oen" to "one". Insert "(Young)" after "exception".

P. 25, line 3: Change "the" to "a" and "personal" to "personnel".

P. 25, line 5: Delete comma. Insert "and". Delete "and utility".

P. 25, line 6: Insert "their utility" before "and".

P. 25, line 12: Insert after "with", the words "regard to". Change "sregeant" to "sergeant".

P. 25, line 13: Change "and" to "as well as". Change "examian-tion" to "examination".

P. 25, line 14: Delete "witnesses,".

P. 25, line 15: Delete "one". Insert "Captain Hylan Sperbeck". Delete comma after "corrections".

P. 26, line 2: Change "taylór" to "Taylor".

P. 26, line 12: Change "Barretts'" to "Barrett's".

P. 26, line 15: Delete first "The expert". Insert "he" instead.

P. 26, line 16: Change comma to period and delete "and the procedure by which such a device is, in, his opinion created."

P. 26, line 21: Change "that" to "whether". Delete comma after "valid", and add after the period, the words "He however".

P. 27, lines 1-3: Delete lines 1-3. Insert "but expressed doubts about its content validity."

P. 27, footnote, line 2: Delete "and" and comma.

P. 27, footnote, line 4: Change "IC" to "IV". Add comma after "infra".

P. 27, footnote, line 5: Change "is" to "are".

POINT I

P. 28, line 17: Change "revd" to "revg'".

P. 29, line 8: Delete period. Insert "in addition to passing rate comparisons in the statewide pool. (T. 500-501, A. 736-737)."

P. 29, first footnote, line 4: Change "significane" to "significance".

P. 30, line 3: Delete "clinches should be emphasized".

P. 30, line 8: Add closing parenthesis after "A. 1934".

P. 30, first footnote, line 3: Change "subtest" to "subtests".

A. The district court should
have relied on defendants'
within facility passing rate
comparisons in preference to
comparisons on the statewide
pool.

P. 31 footnote, line 6: Change "of" to "on".

P. 32 line 4: Delete first "and".

P. 32, second footnote, line 6: Change "her" to "his".

P. 33, line 3: Change "Hispanic" to "Hispanics".

P. 34, line 5: Add "take" after "comparisons".

P. 34, first footnote, line 6: Add quotation marks after period.

P. 34, second footnote, line 2: Change "for" to "of".

P. 34, second footnote: Delete lines 6-10 and insert instead:

of 50 examinations taken by "very few"
candidates: i.e. 83 "minority" candidates
over 41 separate examinations. 330 F.
Supp. at 212. He accepted as "meaningful"
for statistical purposes "9 examinations
taken by 10 or more Black and Puerto Rican
candidates" and "6 examinations which were
taken by a minimum of 18 candidates [from
the White group and from the 'minority'
group]" 330 F. Supp. supra at 212-13.

P. 34, second footnote, line 17: Delete "of".

P. 35, line 6: Insert semi-colon after "deprivation".

P. 36, line 9: Change "in" to "on".

P. 36, line 10: Change "ere" to "were".

P. 36, footnote, line 3: Change "Show" to "Shows".

P. 37, line 8: Change second "that" to "it".

P. 37, first footnote, line 1: Delete "then".

P. 37, first footnote, line 3: Add comma after "facilities".

P. 37, second footnote, line 14: Insert "(footnote continued on following page)".

P. 38, footnote continued from preceding page, line 5: Delete period. Add "on the test."

P. 39, line 3: Change "as" to "is".

P. 40, line 7: Delete "of".

P. 40, line 17: Change "statistically" to "statistical".

P. 40, line 18: Add a period after "ante".

P. 40, second footnote, line 2: Insert "(footnote continued on following page)".

P. 41, footnote continued from preceding page, line 2: Delete first "p". Insert "33" after "p".

P. 43, line 3: Insert "p." reference "34, second footnote."

P. 43: Delete first and second complete paragraphs.

P. 45, line 18: Insert "apparent ethnic" before "differences".
Change "between" to "in".

P. 45, line 19: Insert "the" before "Statewide". Delete "s" on pool and "and facility pools".

P. 46, line 9: Insert "l," after "of".

P. 47, line 3: Delete comma.

P. 47, line 4: Insert comma after Ossining.

P. 47, Subpoint B heading at line 3: Insert "the" after "excluded". Change "which showed" to "defendants' showing".

B. The district court should have excluded the law subtest from the prima facie case on defendants' showing that that subtest had no disproportionate impact on Ossining Blacks.

P. 48, footnote, line 14: Change "issued" to "in issue".

P. 48, footnote, line 19: Change "if" to "it".

P. 49: Delete lines 13 through 15. Insert instead:

and medical components as distinct from the written component of the Fireman's examination there in issue been shown to be "biased", the plaintiffs' constitutional claims against the written component would have been vitiated.
490 F. 2d at 392*

POINT II

P. 51, quoted material, line 12: Change "ensuing" to "ensuring".

A. Examination No. 34-944 met established standards for content validity. Both the competence of the test development process and the individuals responsible for it were demonstrated.

P. 56, footnote, line 13: Insert after first close parenthesis "but includes items".

P. 61, second footnote, line 8: Change "analysis" to "analyses".

P. 62, line 9: Change "issued" to "is used".

P. 66, line 14: Add "as" after "items".

P. 66, line 15: Delete "as".

P. 68, line 2: Change "Siege" to "Siegal".

P. 68, line 4: Change "gen rated" to "generated".

P. 71, line 9: Change "were" to "was".

P. 72: Delete "released". Insert instead "and related".

P. 73, line 2: Change "illustrature" to "illustrative".

P. 76, line 1: Change "adits" to "audits".

P. 76, line 5: Change "not" to "no".

- P. 76, line 22: Change "examination" to "examinations".
- P. 77, line 3: Change "subtests" to "subtest".
- P. 77, line 14: Change "answer" to "answers".
- P. 77, footnote, line 1: Change "reparation" to "Preparation" and "upervision" to "Supervision".
- P. 78, line 1: Change "or" to "on".
- P. 78, line 9: Delete "was".
- P. 78, line 10: Delete first "under". Change "aras" to "areas".
- P. 78, line 18: Change "clavty" to "clarity".
- P. 78, line 19: Change "ic" to "are". Delete "a". Change "element" to "elements".
- P. 80, line 4: Change "in" to "on".
- P. 81, line 5: Change "thir" to "their".
- P. 81, footnote, line 3: Change "standars" to "standards".
- P. 82, line 8: Change "cross-vocational" to "cross-occupational".
- P. 82, line 9: Change "Commissioner" to "Commissioners".
- P. 83, line 1: Change "of" to "or".
- P. 83, line 5: Change "f" to "of".
- P. 83, line 7: Change "eapartment" to "Department".

P. 83, line 17: Change "woud" to "would".

P. 85, line 15: Change "to" to "in".

P. 86, line 14: Add "The" before "Deputy".

P. 88, line 6: Add "it is" before "the".

P. 88, line 7: Delete "it is the". Delete "quite".

P. 88, line 9: Change semi-colon to period.

P. 88, line 10: Change "in" to "In". Change "who" to "whom".

P. 89, line 18: Change "advise" to "advice".

P. 89, line 19: Change "as" to "on".

P. 90, line 11: Insert "the fact" after "by". Delete "in fact do".

P. 90, line 15: Change "the" to "they".

B. Examination No. 34-944 was a
competent measuring device as
were each of the five subtests.

P. 92, quoted material, line 2: Change "valed" to "valid".

P. 92, quoted material, line 9: Change "tat" to "that".

P. 92, quoted material, line 11: Change "ambigeous" to "ambiguous".

P. 93, line 21: Change "scors" to "scores".

P. 93, line 22: Change "varation" to "variation".

P. 94, line 2: Change "n" to "In".

P. 94, line 5: Delete first comma.

C. Examination No. 34-944 was job-
related even if it was not con-
tent valid.

P. 96, footnote, line 6: Change "constillation" to "constella-
tion".

P. 96, footnote, line 11: Change "is" to "in".

P. 96, footnote, line 12: Change "inherent" to "reinforced".

P. 102, line 4: Insert quotation marks after period.

P. 102, line 10: Change "Supervisor" to "Supervision".

POINT III

P. 106, Point Heading, line 1: Delete comma.

P. 106, line 1: Delete "in defining". Insert "defined" instead.

P. 106, line 5: Delete first comma; change second comma to
period. Insert "It".

P. 106, line 7: Delete comma.

P. 106, line 11: Delete comma.

P. 106, line 12: Delete comma.

P. 106, line 17: Change "Dodgow" to "Dolgow".

P. 106, footnote, line 2: Delete "supra". Add at 1766 after "Supp.". Delete "(S.D.N.Y., 1973)".

P. 108, line 8: Add 's' to "Court." Delete "warranting".

P. 108, lines 11-14: Insert instead:

"is between Whites and Blacks at Ossining Correctional Facility. At other facilities between Whites and Blacks and between Whites and Hispanics, there were no significant differences in passing rates. Consequently, at the passing rate level which plaintiffs urge as determinative,"

POINT IV

P. 111, line 2: Insert "limited" after second "is".

A. The requirement for a criterion-validated final selection device.

P. 114, line 5: Change "text" to "test".

P. 115, line 6: Change "in" to "as".

P. 116, line 9: Delete "fail to".

P. 116, footnote, line 1: Change "guidelines" to "Guidelines".

P. 116, footnote, line 5: Add quotation marks after "etc.".

P. 116, footnote lines 7-9: Delete "Therefore defendants will be required to criterion validate if they have a sufficient "N" or sample size".

P. 118, line 12: Insert "simply" after "not".

P. 118, line 17: Insert "simply" after "not".

P. 118, line 21: Delete comma after "validated." Insert comma after "device." Insert "most" after "the".

P. 120, lines 18-22: Delete lines 18-22. Insert instead:

"In light of the foregoing, the District Court exceeded its authority in requiring that the final selection procedure be criterion-validated and, in practical terms, ordered a remedy that will create more problems than it will resolve."

B. The District Court erred and abused its discretion in not permitting the provisional Sergeants to be made permanent.

P. 120, line 27: Change "to" to "for".

P. 121, line 1: Change "provision" to "provisional".

P. 122, line 14: Delete "that". Insert "finding" after "the".

P. 122, line 15: Insert "that the" before "Court".

P. 122, line 16: Insert "incumbent" before "provisionals".

P. 122, line 17: Delete "either". Delete "over". Insert "or more" after "year".

P. 122, line 17-18: Delete

"or for which they had a reasonable and legitimate expectation of obtaining."

P. 122, line 19: Insert

"limited remedial action on
behalf of incumbents" before
"remedy". Delete "remedy".

P. 122, line 22: Delete "s" on "dislocations". Insert "to the
incumbents."

D. The District Court, assuming
arguendo, that the facts
warranted affirmative relief,
abused its discretion in con-
tinuing such relief until parity
was reached.

P. 131, line 4: Delete period. Insert open parenthesis before
"As". Change "As" to "as".

P. 131, line 6: Insert close parenthesis after "1447)".

P. 132, line 1: Change "would be" to "if".

P. 132, line 3: Change "earlier" to "one".

P. 132, line 4: Change "act" to "fault". Change "its" to "their".
Change "at a" to "almost".

P. 132, line 5: Delete "later point in time." Insert "immediately
thereafter".

P. 133, line 18: Insert "131" after "p.".

P. 136, line 6: Change "competence" to "competitive".

P. 136, line 11: Change "fourteenth" to "Fourteenth".

P. 136, line 13: Change "provision" to "provisional".

POINT V

A. Sovereign Immunity Bars the
Award of Attorney's fees.

P. 140, line 2: Delete comma after the word "below".

P. 140, line 3: Delete comma after "Amendment"; insert comma after "claim".

P. 140, line 15: Delete comma after "Amendment".

P. 140, Second footnote,: Delete text. Insert instead "The related concept of official immunity is to be distinguished."

P. 144, line 17: Delete second "for".

P. 146, line 21: Insert "were" after "funds".

P. 146, Second footnote, line 5: Change "in" to "is".

P. 146, Second footnote, line 7: Insert "and" after "nature".

P. 147, Line 24: Add "s" to "decree". Delete "state".

P. 148, first footnote, line 2: Change "on" to "en".

P. 148, second footnote, line 3: Change "lood" to "look".

P. 148, second footnote lines 7-8: Delete "the Court to rely".
P
Insert "relying".

P. 148, Second footnote, line 12: Change "statutory" to "statute".

P. 148, Second footnote, line 15: Change first "the" to "a".
Delete second "is".

P. 150, line 20: Change "beat" to "bear".

P. 152, line 4: Add "such" after "attendant".

P. 152, line 18: Delete underline under "to the". Change period to comma.

P. 152, line 20: Change "is" to "are".

P. 153, line 2: Change "himself" to "themselves". Change comma after "large" to period.

P. 153, line 3: Delete line 3. Insert instead "The Court found that the requirements underlying the award of attorney's fees were met on those facts."

P. 153, line 10: Change "desparate" to "disparate".

P. 153, footnote, line 5: Delete dots.

P. 153, footnote, line 6: Delete "substantially".

P. 153, footnote, line 7: Delete "of".

P. 156, line 3: Change "due" to "one".

P. 156, line 4: Change "an" to "a matter of".

P. 156, footnote line 7: Change "creat" to "create".

P. 157, second footnote, line 2: Delete "to be".

P. 160, line 8: Add "the" after "hold". Change "four" to "five".

P. 160, second footnote, lines 3-4: Delete "and the creation of a criterion validated selection device", and "resources of".

P. 160 second footnote, line 5: Add "personnel" before "responsible". Delete "the performance of" and "and".

P. 160, second footnote, line 6: Delete "creation of the criterion-related selection device,"

P. 160, second footnote, lines 8-9: Delete "thus steeping themselves an examination of practices no longer to be followed, instead of creation of a more psychometrically complete procedure" and "process". Insert "study" instead of "process".

P. 162, line 3: Insert after "theory", "has not been met under the facts and circumstances of this case:."

P. 162, line 14: Change "*" to "***".

P. 162, first footnote, line 1: Delete "indeed".

P. 162, first footnote, line 4: Change "his" to "him".

P. 162, second footnote, line 3: Delete "by plaintiff".

P. 163, line 3: Change "before" to "ago".

P. 163, second footnote, line 1: Change "Defendant's" to "Defendants".

P. 163, second footnote, line 12: Delete "and indeed disposes of it".

P. 164, first footnote, line 7: Insert after "p" "p 157-159".

P. 164, second footnote, line 6: Insert after "pp." "157-159", and after supra insert close parenthesis and comma. Insert "it" after "but".

P. 164, second footnote, line 14: Change "provision" to "provisions".

P. 165, line 2: Delete "most complex". Insert instead "that".

P. 165, line 3-4: Delete lines 304. Insert instead "their own choice".

P. 166, lines 6-7: Delete "the government greater funds with which to improve their valid testing procedures?" Insert instead "for the improvement of testing procedures?"

P. 166, line 7: Delete "mere".

P. 166, line 9: Delete "used must be" Insert instead "should be".

P. 166, footnote, line 1: Change "that" to "this". Delete ", involving". Insert open parentheses before "approximately". Insert close parenthesis after "approximately". Delete comma.

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Janet Portelly , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Defendants-
Appellants
herein. on the 4th day of March , 1975 ,s he served
the annexed upon the following named person :

Deborah M. Greenberg, Esq.
10 Columbus Circle
New York, NY 10019

Richard R. Rowley, Esq.
90 State Street
Albany, NY 12207

Attorneys in the within entitled action by depositing
three copies
a true and correct ~~copy~~ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by them for that
purpose.

Sworn to before me this
4th day of March , 1975

Deputy
Rhonda Ankrut Bayes
Assistant Attorney General
of the State of New York